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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 SPY PHONE LABS LLC,
15 Plaintiff,

16 v.
17 GOOGLE INC., ANDREI CIUCA, d/b/a
18 CAD DESIGN, and JOHN DOES 1-49,
Defendants.

Case No.: 5:15-CV-03756-PSG

**PLAINTIFF SPY PHONE LABS, LLC'S
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Hearing Date: November 24, 2015
Time: 10:00 am
Judge: Honorable Paul Singh Grewal
Location: 5 – 4th Floor

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND COUNTERSTATEMENT OF FACTS

Plaintiff Spy Phone Labs LLC (“Plaintiff”) has sued defendant Google, Inc. (“Google”) for contributory trademark infringement because Google has supplied and continues to supply services that Google knows to be infringing on Plaintiff’s federally registered trademark SPY PHONE®, which has caused grave damage to Plaintiff’s business. Plaintiff has also sued Google for tortious interference with economic advantage for actions that wrongfully and unfairly interfere with Plaintiff’s business.

Google has moved to dismiss Plaintiff’s amended complaint (“Complaint”) pursuant to Fed. R. Civ. P. 12(b)(6). That motion should be denied for the following reasons:

Contributory trademark infringement: The question of whether Plaintiff has stated a claim against Google for contributory trademark infringement turns on whether Google had knowledge of direct infringement by others, a question ill-suited for resolution on a Rule 12(b)(6) motion. Plaintiff has already identified at least one instance (acknowledged by Google) where Google had notice of a specific infringement but failed to act, as well as several other circumstances which, if proven, would establish that Google knew about other instances of infringement but took no action. (*See* Point II.A, *infra*.)

Tortious interference with prospective economic advantage: The question of whether Google may avoid liability based on the affirmative defense of immunity under § 230 of the Communications Decency Act of 1996 (“CDA”) is likewise inappropriate for resolution on a Rule 12(b)(6) motion. Even if the Court was presently willing to consider this defense, however, the allegations in the Complaint are sufficient to raise a question of whether Google’s actions against Plaintiffs were taken in good faith, a required element for CDA immunity. Further, as described in detail below, Plaintiff has adequately alleged the necessary elements of a claim for tortious

interference, including the requirement under California law of alleging an independent wrongful act apart from the interference itself and recoverable damages. (*See* Point II.B, *infra*.)

Nonetheless, should the Court find that any element of Plaintiff's claims has not been sufficiently pled, Plaintiff respectfully requests leave to re-plead. (*See* Point II.C, *infra*.)

A. Google And Google Play

Google owns and operates Google Play, a digital distribution platform for software applications ("apps") that can be downloaded on smart phones and other devices that operate on the Android® operating system. (Complaint ¶ 12.) Upon information and belief, 90% of all Android®-based apps downloaded onto a mobile device are downloaded through Google Play, making it the dominant marketplace by far. (*Id.* ¶ 15.)

An app developer who seeks to offer an app for download on Google Play must agree to abide by the policies and procedures established by Google, which are incorporated into a contract prepared by Google entitled Developer Distribution Agreement ("DDA"). (*Id.* ¶ 20.)¹ Google's developer policies and procedures include prohibitions against trademark infringement as well as apps that constitute "spyware," or "malware" or that generate "spam." (*Id.* ¶¶ 21-24.) The DDA provides that if Google is notified "or otherwise becomes aware" that a developer is offering a product that violates any of its developer policies, Google may remove the product from Google Play and reserves the right to suspend and/or bar its developer from Google Play. (*Id.* ¶ 26.) A group of Google employees known as the "Google Play Team" regularly and routinely monitors the apps listed on Google Play to ensure compliance with Google policies and procedures. (*Id.* ¶¶ 27-28.) Monitoring by the Google Play Team is performed both in response to specific customer complaints and via independent investigations and quality checks. (*Id.*)

¹ A copy of the DDA is included with Google's moving papers as Exhibit C (Dkt. # 35-5.) The DDA includes a choice of law provision stating that Plaintiff's "relationship with Google under this [DDA] shall be governed by the laws of the State of California without regard to conflict of law provisions." (*Id.* at § 15.7.)

1 B. Plaintiff's Trademark, Domain Name And App

2 Plaintiff is the owner of the federally registered trademark SPY PHONE® and the domain
 3 name <spyphone.com>. (*Id.* ¶¶ 29-31.) Plaintiff is also the developer of an downloadable app that
 4 operates on the Android® operating system ("Plaintiff's App"). (*Id.* ¶ 32.) Plaintiff's App is what
 5 it commonly known as a parental monitoring app. (*Id.* ¶ 33.) When downloaded on a mobile
 6 phone, Plaintiff's App allows the user or an authorized third party, such as a parent or guardian, to
 7 track information about how the phone is being used, including the location of the phone through
 8 GPS tracking, the telephone number of the sender or recipient of messages, and Internet usage.
 9 (*Id.*) Information obtained from a mobile phone by Plaintiff's App is transmitted from the phone to
 10 a secure server maintained by Plaintiff, and can be accessed only through a private account that can
 11 be accessed through a website operated by Plaintiff at <spyphone.com>. (*Id.* ¶ 34.) At all relevant
 12 times alleged in the Complaint, Plaintiff's App complied with all Google's requirements, policies
 13 and procedures. (*Id.* ¶¶ 35-36.)

14 Plaintiff's App is free to download, but generates revenue through advertisements placed on
 15 the website associated with <spyphone.com>. (*Id.* ¶¶ 37-38.)

16 C. Plaintiff's App Is Listed on Google Play Under the SPY PHONE® Brand Name

17 In or about August 2012, Plaintiff created a developer account for Google Play. (*Id.* ¶ 42.)
 18 At the time Plaintiff established its developer account, and at all times since then, there have been
 19 dozens of parental monitoring apps created by different developers available on Google Play that
 20 perform the same or similar functions as Plaintiff's App. (*Id.* ¶ 43.)

21 After establishing its developer account, Plaintiff initially listed Plaintiff's App for
 22 download under the trademark name "SPY PHONE® Phone Tracker." (*Id.* ¶ 44.) By obtaining a
 23 trademark registration for SPY PHONE®, Plaintiff sought to identify and distinguish its parental
 24 monitoring app from similar functioning apps offered by other developers and to prevent other
 25 developers from copying the name, which gave Plaintiff's App a clear identification from other
 26 developers from copying the name, which gave Plaintiff's App a clear identification from other
 27 developers from copying the name, which gave Plaintiff's App a clear identification from other
 28 developers from copying the name, which gave Plaintiff's App a clear identification from other

1 parental monitoring apps. (*Id.* ¶ 45.) Between August 2012 and June 2013, “SPY PHONE®
2 Phone Tracker” was one of the most popular apps downloaded from Google Play, with over 1.1
3 million downloads, which created substantial revenue for Plaintiff. (*Id.* ¶¶ 46-47.)

4 D. Without Warning, Google Removes Plaintiff’s App From Google Play and
5 Suspends Plaintiff’s Developer Account Without Cause

6 Starting in or around November 2012, Plaintiff discovered that other developers were
7 attempting to emulate the success of Plaintiff’s App by offering parental monitoring apps for
8 download on Google Play under names that copied or incorporated Plaintiff’s SPY PHONE®
9 trademark. (*Id.* ¶ 48.) In response to the other developers’ use of its SPY PHONE® trademark,
10 Plaintiff submitted trademark infringement complaints against these developers using Google
11 Play’s online complaint form. (*Id.* ¶ 49.) From approximately November 2012 through May 2013,
12 in response to Plaintiff’s trademark complaints, Google removed several parental monitoring apps
13 listed on Google Play by other developers under names that either incorporated or copied Plaintiff’s
14 trademark. (*Id.* ¶ 51.)

15
16 On May 17, 2013, Plaintiff’s representative submitted a trademark complaint against Cad
17 Design, a developer which had listed a parental monitoring app on Google Play under the name
18 “Spy Phone App.” (*Id.* ¶ 53.) On June 13, 2013, Google removed Cad Design’s parental monitor
19 app from Google Play in response to Plaintiff’s claim of trademark infringement. (*Id.* ¶ 54.) This
20 takedown led to a series of disturbing emails directed at Plaintiff from defendant Andrei Ciuca
21 (“Ciuca”), who identified himself as the programmer doing business as Cad Design. (*Id.* ¶ 55.)

22
23 Almost immediately thereafter, Google started taking actions to prevent Plaintiff from
24 exercising and enforcing its trademark rights. (*Id.* ¶ 57.) Although Plaintiff did not realize it at the
25 time, Plaintiff now believes, based on subsequent events, that these actions were orchestrated by
26
27
28

defendant Ciuca, members of the Google Play Team and possibly other Doe Defendants, and intended to intentionally harm Plaintiff's business, as described further below. (*Id.*)²

The first such adverse action occurred on June 24, 2013, when Plaintiff's representative submitted an online trademark complaint form to Google against a developer who was infringing on Plaintiff's trademark by using the name "Reptilicus.net Brutal Spy Phone." (*Id.* ¶ 58.) Instead of removing this app, as it had done with other apps that incorporated Plaintiff's trademark, the Google Play Team stated that it would take no action:

As a preliminary matter, please note that Google is not in a position to mediate trademark disputes between developers and trademark owners. As a courtesy we have considered your claim, but are unable to determine its merits at this time.

(*Id.* ¶ 59.)³ Next, on June 28, 2013, the Google Play Team notified Plaintiff that Plaintiff's App had been removed from Google Play and Plaintiff's developer account had been terminated because Plaintiff's App allegedly violated Google's anti-spyware policy. (*Id.* ¶¶ 60-61.) Plaintiff denies that Plaintiff's App violated Google's anti-spyware policy and believes that there was no real justification for either the removal of Plaintiff's App from Google Play or the termination of its developer account. (*Id.* ¶¶ 62-65.)

E. Plaintiff Is Compelled To Stop Using Its Registered Trademark

After an unsuccessful appeal through Google's online appeals process, Plaintiff instructed its counsel to file an earlier lawsuit against Google demanding reinstatement of Plaintiff's App and Plaintiff's developer account. (*Id.* ¶¶ 66-70.) During discussions between Plaintiff's counsel and

² The "Doe Defendants" are other developers who have infringed on Plaintiff's trademark and whose real names and contact information are unknown to Plaintiff, but presumably known to Google. (Complaint ¶ 6.)

³ As described below at p. 12, Google's failure and refusal to take action against at least one infringing app as to which it had specific knowledge is a significant distinction between Google's conduct and the conduct of defendants in other cases who were able to avoid liability for contributory trademark infringement. Google has attempted to explain its failure to act, but the legitimacy of Google's conduct is not ripe for determination on this motion.

representatives of Google, Google eventually acknowledged that none of the functions or features of Plaintiff's App violated Google's anti-spyware policy. (*Id.* ¶ 72.) Nonetheless, Google still refused to reinstate Plaintiff's App because, according to the Google Play Team, Plaintiff's use of its trademarked name SPY PHONE® to identify Plaintiff's App violated the anti-spyware policy:

While providing additional disclosure in the app description and regular notification to targeted phones are crucial steps to accomplishing policy compliance, the Google Play Team believes the app is still in violation of policy because of the app's title. App titles should not be misleading or represent the product as being spyware and/or capable of surreptitious tracking [emphasis added].

(*Id.* ¶ 73.)

Plaintiff's counsel responded by observing that not only does Plaintiff have a federally registered trademark for the brand name SPY PHONE®, there were currently dozens of other parental monitoring apps listed on Google Play that contained the word "spy" in the title and no actions were being taken against the developers of those apps. (*Id.* ¶ 74.) Google's response was that, going forward, all developers would be prohibited from using the word "spy" in the title an app listed on Google Play, and that Plaintiff must stop using its SPY PHONE® trademark if Plaintiff wanted to list Plaintiff's App on Google Play. (*Id.* ¶ 75.) In the face of this ultimatum, and in reliance on Google's statement, Plaintiff agreed to discontinue its lawsuit without prejudice and to stop using the brand name SPY PHONE® to identify Plaintiff's App on Google Play in return for Google agreeing to reinstate Plaintiff's developer account. (*Id.* ¶ 76.)

F. Despite What It Said, Google Allows Other Developers To Operate As Usual

In October 2013, after deleting all prior customer reviews that allowed Plaintiff's App to achieve its high ranking, Google reinstated Plaintiff's developer account, and Plaintiff began offering Plaintiff's App for download on Google Play under the name "Phone Tracker." (*Id.* ¶¶ 77-78.) For the ten-month period between October 2013 and July 2014, the number of downloads for Plaintiff's App plummeted along with Plaintiff's revenue. (*Id.* ¶¶ 79-80.)

1 Meanwhile, contrary to Google’s representation that it would no longer permit developers
2 to use the word “spy” in the name of an app list on Google Play – which would also have
3 necessarily prevented developers from using names that infringed on Plaintiff’s trademark – dozens
4 and dozens of other developers, including defendant Ciuca and the Doe Defendants, were permitted
5 to list parental monitoring and other apps on Google Play containing the word “spy” in the name.
6 (*Id.* ¶ 80.) Several of these parental monitoring apps actually used or incorporated Plaintiff’s SPY
7 PHONE® trademark, including apps named “Spy Phone” and “SpyPhone 1.0.” (*Id.* ¶¶ 82, 84.)
8 Given Google’s representation that the Google Play Team intended to take affirmative steps to
9 prohibit developers from using the word “spy” in the name of an app and the ease with which
10 offending apps could be located, Google knew (or was willfully blind to the fact) that developers,
11 including Ciuca and the Doe Defendants, continued to list apps with the word “spy” in the title and
12 that infringed Plaintiff’s SPY PHONE® trademark after Plaintiff’s agreement to stop using its
13 trademarked name was made a condition of its reinstatement. (*Id.* ¶¶ 85-86.) Indeed, Plaintiff
14 believes that it was the only developer who had its account terminated or suspended by Google for
15 offering an app for download on Google Play that used the word “spy” in the name, and the only
16 developer who was prohibited from listing an app on Google Play with the word “spy” in the name
17 as a condition of maintaining a developer account. (*Id.* ¶¶ 87-88.)

20 G. Plaintiff Is Unjustifiably Suspended For a Second Time From Google Play

21 After realizing that Google, despite its prior representation, was allowing other developers
22 to list apps on Google Play that either used the word “spy” and/or Plaintiff’s SPY PHONE®
23 trademark in its name, starting in or around January 2014, Plaintiff began submitting complaints to
24 Google about other developers who were violating the purported policy of prohibiting apps from
25 being listed if the word “spy” appeared in the name. (*Id.* ¶¶ 89-90.)

27 On both July 2 and 10, 2014, Plaintiff’s representative submitted spyware complaints to the
28 Google Play Team about a parental monitoring app offered for download on Google Play that used

the word “spy” in its name. (*Id.* ¶ 91.) Upon information and belief, the developer of the app about which these complaints were lodged was defendant Ciuca, the same developer against whom Plaintiff had submitted a trademark infringement complaint shortly before Plaintiff’s developer account was terminated in June 2013. (*Id.* ¶ 92.)

On July 16, 2014, Google suspended Plaintiff’s developer account and Plaintiff’s App was removed from Google Play. (*Id.* ¶ 93.) The reason then given was that Plaintiff’s App violated Google’s “spam” policy. (*Id.*) Plaintiff never saw the complaint and was given no prior warning before being suspended. (*Id.* ¶ 94.) Contrary to the complaint that was supposedly filed, Plaintiff’s App complied in all respects with Google’s spam and other policies, and Google knew that there was no legitimate justification its removal. (*Id.* ¶¶ 95, 97.)

H. Plaintiff Receives a Letter Confirming Its Suspicions That Google Acted in Bad Faith in Removing Plaintiff’s App From Google Play

Approximately 30 days after its developer account was suspended in July 2014, Plaintiff received an anonymous letter in the mail from a person who identified him/herself as a “concerned” member of the Google Play Team, and who was “uneasy” about the way that Plaintiff was being treated. (*Id.* ¶ 103.) The letter stated that: (a) “there was no real justification” for the adverse actions taken by Google against Plaintiff in 2013 and 2014, and that such actions were taken to punish Plaintiff for filing complaints to enforce its rights in SPY PHONE® (*Id.* ¶ 104); (b) Google has no actual policy against using the word “spy” in the name of an app, and that Plaintiff was the only developer that Google had ever prevented from using that name “spy phone” (*Id.* ¶ 105); and (c) many Google employees enhanced their income by either developing their own apps or helping other developers who have apps listed on Google Play, and that these employees had orchestrated the takedown of Plaintiff’s App:

When you sent in your last take down notice, you needed to be taken out. They just got someone to send in a complaint against your app and then you [were] instantly gone. Someone needs to do something or things will just get worse.

(*Id.* ¶ 106.)

I. Plaintiff Commenced This Action, Gives Additional Notice of Actual Infringement, But Google Still Fails To Take Corrective Action

On September 9, 2014, Plaintiff's counsel notified Google in writing that, among other things, Plaintiff's registered SPY PHONE[®] trademark continues to be infringed by other developers listing apps for download on Google Play. (*Id.* ¶ 116.) Google did not respond to this letter and, upon information and belief, took no action to prevent any developer from listing any app on Google Play that infringed on Plaintiff's trademark. (*Id.* ¶ 117.)

Accordingly, Plaintiff commenced this action on October 22, 2014. The original complaint, served on or about October 28, 2014, expressly alleged that there were still apps listed on Google Play that infringed Plaintiff's registered SPY PHONE[®] trademark. (*Id.* ¶ 118.) Following service of the complaint, Google took no action to remove any app or prevent any developer from listing any app on Google Play that infringed Plaintiff's trademark. (*Id.* ¶¶ 119.)

Plaintiff's amended Complaint, filed and served on January 23, 2015, contains three causes of action: (1) direct trademark infringement against Ciuca and the Doe Defendants (*Id.* ¶¶ 122-129); (2) contributory trademark infringement against Google (*Id.* ¶¶ 130-143); and (3) tortious interference with prospective economic advantage against all defendants (*Id.* ¶¶ 144-150). On the date the Complaint was filed, there were still apps listed for download on Google Play that infringed Plaintiff's registered SPY PHONE[®] trademark, including an app named "SpyPhone 1.0." (*Id.* ¶¶ 120-121.)⁴

⁴ On February 10, 2015, Google sent a notice stating that, in response to the Complaint, an app listed on Google Play had been removed for violating Google's trademark infringement policy. (*See* Declaration of Michael A. Freeman ("Freeman Decl.") at ¶ 3, which is Exhibit A to the accompanying Declaration of Neil Smith.) On February 17, 2015, Google sent another notice stating that it had removed another infringing app without referring to the Complaint and despite Plaintiff not having filed an online complaint. (Freeman Decl. at ¶ 4.) This second notice, in particular, demonstrates both Google's knowledge of ongoing infringement and its ability to independently monitor the content on Google Play even in the absence of a specific complaint.

1 J. Procedural History

2 This case was initially filed U.S. District Court for New Jersey. Google moved to transfer
 3 the case to this Court pursuant to 28 U.S.C. § 1404 based on a forum selection clause in the DDA
 4 or, in the alternative, to dismiss the second and third causes of action for failure to state a claim.
 5 On August 13, 2015, the New Jersey District Court granted the part of the motion requesting the
 6 transfer. The court found that, although Plaintiff's claim for contributory trademark infringement
 7 did not arise under the DDA and, thus, was not subject to the forum selection clause, Plaintiff's
 8 claim for tortious interference "originates from the DDA." (Dkt. # 21 at pp. 6-8.) Although
 9 observing that, in such circumstances, it will sometimes be appropriate to sever the claims and try
 10 them separately, the Court held that, in this case, the interests of judicial efficiency and economy
 11 warranted transferring the entire action. (*Id.* at 8-9.) The New Jersey court did not rule on
 12 Google's motion to dismiss.

14 **II. ARGUMENT**

15 A. The Complaint States a Claim Against Google For Contributory Trademark
 16 Infringement

17 Google seeks dismissal of Plaintiff's claim for contributory trademark infringement under
 18 Rule 12(b)(6) on the ground that Google lacked sufficient knowledge of any direct trademark
 19 infringement by other developers. (Google's Moving Brief ("Mov. Br.") at 6-9.) This Court
 20 cannot and should not attempt to resolve this fact-intensive question on a pre-answer motion to
 21 dismiss, particularly without evidence of what Google knew.

22 To state a claim for contributory trademark infringement, a plaintiff must allege facts
 23 sufficient to show that the defendant supplied its products or services "to one whom it knows or has
 24 reason to know is engaging in trademark infringement." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456
 25 U.S. 844, 854 (1982); *accord Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936,
 26 942 (9th Cir. 2011) (plaintiffs must show that "defendants provided their services with actual or
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constructive knowledge that the users of their services were engaging in trademark infringement”); *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 104 (2d Cir. 2010) (plaintiff must show that “the service provider . . . ‘continues to supply its [service] to one whom it knows or has reason to know is engaging in trademark infringement’”). In addition, under Ninth Circuit precedent, a plaintiff must also allege that the defendant had “[d]irect control and monitoring of the instrumentality used by a third party to infringe” the mark. *Louis Vuitton*, 658 F.3d at 942 (quoting *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999)).

The Complaint here alleges that, since at least June 2013, Google had actual knowledge of apps listed on Google Play that infringed on Plaintiff’s SPY PHONE® trademark or has willfully turned a blind eye to the presence of such infringing apps with knowledge that they exist. (Complaint ¶ 134.) The Complaint further alleges that Google has nonetheless continued to supply its services to defendant Ciuca and the Doe Defendants. (*Id.* ¶ 135.) In addition, the Complaint alleges that Google has direct control over the operations of Google Play, has the ability to monitor the content posted on Google Play and that Google does, in fact, regularly monitor the content posted on Google Play. (*Id.* ¶¶ 27, 131-132.) These allegations are sufficient to state a claim for contributory trademark infringement against Google.

Looking past these well-pled allegations in the Complaint, Google argues that the Complaint does not allege that Google had the requisite knowledge to be held liable for contributory trademark infringement. Relying heavily on the decision in *Tiffany*, which said that liability for contributory infringement requires proof of specific knowledge that someone is infringing, rather than just general knowledge that infringement is occurring, 600 F.3d at 105, Google contends that it cannot be held liable because it “did not ignore any specific trademark complaint submitted by Plaintiff” (Mov. Br. at 8, emphasis in original.) In the very next breath, however, Google admits that this is not true, because there was at least one instance where Google outright refused to remove an infringing app (“Reptilicus.net Brutal Spy Phone”) from

Google Play following a specific trademark complaint from Plaintiff, which was made just days before Plaintiff's developer account was first terminated without justification. (Complaint ¶¶ 58-65.) Compare, *Tiffany* 600 F.3d at 99 ("During the relevant time period, the district court found, eBay 'never refused to remove a reported listing'" in response to a complaint by Tiffany, and always acted within 24 hours).⁵ While Google now tries to explain in its brief why it did not remove the clearly infringing app (Mov. Br. at 8, n.6), it is impossible to determine on a Rule 12(b)(6) motion whether this newly-offered explanation is credible or not.⁶ Since this incident alone, which Google acknowledges actually occurred, would be enough to hold Google liable for contributory trademark infringement, Google's motion should be denied at this early pleadings stage.

But these are not the only facts alleged in the Complaint that call into question Google's assertion that it lacked specific knowledge of direct infringement by others. The Complaint also alleges that Plaintiff received a letter from a Google employee stating that Google employees who worked on the Google Play Team were in cahoots with other developers who were known to be infringing on Plaintiff's trademark. (*Id.* ¶¶ 103-106.)⁷ The Complaint further identifies several

⁵ In sharp contrast to the *Tiffany* case, where the record showed that defendant eBay usually took corrective action within 24 hours or less, Google typically took weeks to respond to a trademark infringement complaint. (*See* Complaint ¶¶ 53-54.)

⁶ In its brief, Google says that it did not remove an app called "Reptilicus.net Brutal Spy Phone" from Google Play because it was uncertain about whether the words SPY PHONE® were being used "merely as a descriptor and not as a trademark." (Mov. Br. at 8, n.6.) Google professed no such trouble when removing apps from Google Play in response to infringement complaints prior to June 2013 (*see* Complaint ¶¶ 49-52) and the explanation given by Google to Plaintiff at the time said nothing about any supposed uncertainty. (Complaint ¶ 59.) An equally plausible explanation as to why this infringing app was not removed in June 2013 is that the developer of this app had an illicit agreement with someone at Google not to remove it. (Complaint ¶¶ 103-106.)

⁷ Google attempts to cast doubt on the veracity of Plaintiff's allegations regarding the anonymous letter received from a Google employee because the letter was not attached to the Complaint. (Mov. Br. at 5.) This is improper, since the rules of procedure impose no requirement on Plaintiff to attach any documents to its pleadings. Fed. R. Civ. P. 8(a)(2). That being said, Plaintiff can supply the letter to the Court upon request.

1 apps listed on Google Play in 2014 that were directly infringing Plaintiff's trademark and not
 2 removed by Google prior to the filing of the Complaint, and how Google's employees must have
 3 known about these infringing apps given Plaintiff's past complaints and the ease with which
 4 Google could have discovered them. (Complaint ¶¶ 84-86, 98-99, 111-113, 119-121.) The
 5 Complaint also explains how Google's employees regularly monitor the contents of Google Play to
 6 ensure compliance with its terms and conditions, independent of any specific complaints, thereby
 7 creating additional opportunity to acquire actual knowledge. (*Id.* ¶ 27.) These allegations, which
 8 must be accepted as true at this stage of the case, adequately allege Google's specific knowledge of
 9 infringing apps and, contrary to Google's contention (Mov. Br. at 8), go far beyond alleging simply
 10 that Google had "general knowledge" of other infringing apps on Google Play.⁸

12 The nature of the infringement being alleged is yet another critical distinction between this
 13 case and *Tiffany*. In *Tiffany*, a key fact lending to the decisions of both the district court and the
 14 Second Circuit was that it was not possible for defendant eBay to determine from the listing alone
 15 whether vendors were selling genuine Tiffany merchandise or counterfeits:

17 Because eBay never saw or inspected the merchandise in the listings, its ability to
 18 determine whether a particular listing was for counterfeit goods was limited. Even had it
 19 been able to inspect the goods, moreover, in many instances it likely would not have had the
 20 expertise to determine whether they were counterfeit.

21 *Tiffany*, 600 F.3d at 98 (citations and quotes omitted). The inability of eBay to determine from the
 22 face of the listing whether a vendor was infringing led the Second Circuit to affirm the district
 23 court's conclusion that eBay lacked the requisite specific knowledge to be held liable for
 24 contributory trademark infringement. *Id.* at 109 ("Tiffany failed to demonstrate that eBay was

25 ⁸ Moreover, events that occurred after the Complaint was filed establish that Google is able to
 26 remove infringing apps – and has specifically done so – based solely on a non-specific complaint
 27 by Plaintiff its trademark is being infringed. (See Note 4 and Freeman Decl. Exhibits 1 and 2.)
 28 Should the Court find that allegations of Google's specific knowledge are not sufficiently pled in
 the Complaint, Plaintiff respectfully requests leave to amend its Complaint to include this new
 information. (See Point III, *infra*.)

1 supplying its service to individuals who it knew or had reason to know were selling counterfeit
2 Tiffany goods”). By contrast here, none of the other developers were offering Plaintiff’s App
3 without authorization, but rather that they were offering their own apps using Plaintiff’s trademark.
4 (Complaint ¶¶ 82, 84.) Thus, unlike eBay in the Tiffany case, Google can tell from the face of the
5 listing whether there is direct infringement, which lends greater plausibility to Plaintiff’s
6 allegations that Google had actual knowledge of (or willfully turned a blind eye to) developers who
7 were infringing Plaintiff’s trademark. *See Evans v. Hewlett-Packard Co.*, No. C 13-02477 WHA,
8 2013 WL 4426359 at *2 (N.D. Cal. Aug. 15, 2013) (refusing to dismiss claim for contributory
9 trademark infringement at the pleadings stage where allegations “permit an inference that
10 defendants knew, or could have reasonably deduced” that mark owner objected to infringer’s use).

12 Google’s argument (Mov. Br at 9) that it should not be held liable for contributory
13 infringement because Plaintiff did not utilize Google’s online trademark complaint form to notify
14 Google of specific incidents of trademark infringement is likewise unavailing for at least two
15 reasons. First, Google’s obligation to act in the face of known trademark infringement does not
16 arise from the DDA or Google’s internal procedures, but from the Lanham Act. If, as Plaintiff has
17 alleged, Google was aware of specific developers and apps that were infringing on Plaintiff’s
18 trademark, whether the result of a trademark complaint or due to a spyware complaint, Google had
19 a legal duty to act, regardless of how Google learned about the infringing app. Second, even if
20 Google is correct that its duties and obligations vis-à-vis Plaintiff arise solely from its Google’s
21 developer policies and procedures, there is nothing in the DDA to suggest that Google’s duty to
22 take action against direct trademark infringers depends on the form of notice that it receives, be it a
23 trademark infringement complaint, an anti-spyware complaint, or a complaint filed in federal
24 district court. Google’s developer policies and procedures explicitly state Google will act against
25 violators as to whom it is specifically notified “or otherwise becomes aware.” (Complaint ¶ 26.)
26 Google has failed to explain how or why Plaintiff’s decision to not always use Google’s online
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1 trademark complaint form changes Google's legal obligation to act if it has knowledge of
2 infringement.

3 Finally, Google's reliance on *Tiffany* on a motion to dismiss is also misplaced because the
4 procedural posture of the litigation in *Tiffany* was completely different from the one here. The
5 decision in *Tiffany* was rendered following both discovery and a bench trial, during which evidence
6 of what the defendant's employees knew and did not know was explored extensively. By contrast,
7 this case is at the pleadings stage and Plaintiff has had no opportunity to test the allegations of its
8 Complaint in discovery. See *Rosetta Stone, Ltd. v. Google, Inc.*, 676 F.3d 144, 164 (4th Cir. 2012)
9 (criticizing the district court's "heavy reliance" on *Tiffany* in deciding a motion for summary
10 judgment, and observing that *Tiffany* was decided on appeal following a "lengthy bench trial").
11 Google's request to have this Court dismiss the action without providing Plaintiff an opportunity to
12 take discovery is particularly inappropriate given that crux of Google's defense is that they lacked
13 knowledge of actual infringement, a question ill-suited to resolution on a Rule 12(b)(6) motion.
14 *Gray v. BMW of North America, LLC*, No. 13-cv-3417 (WJM)(MF), 2014 WL 4723161 at *3
15 (D.N.J. Sep. 23, 2014) (questions concerning defendant's knowledge "are properly to be
16 determined through discovery, not on a motion to dismiss").
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19 For all of these reasons, Google's motion to dismiss Plaintiff's contributory trademark
20 infringement claim should be denied.⁹
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22 ⁹ On reply, Google may cite to *Free Kick Master LLC v. Apple Inc.*, No. 15-CV-03403-PJH, 2015
23 WL 6123058 (N.D. Cal. Oct. 19, 2015), a case decided by this Court since Google submitted its
24 motion to dismiss, which granted Google's motion to dismiss a claim for contributory trademark
25 infringement (with leave to amend) for failing to plead that Google had specific knowledge of the
26 infringement. The Court found that the plaintiff's complaint "allege[d] no facts showing that . . .
27 Google . . . knew that the third-party developers' apps/games were infringing plaintiff's mark but
28 continued to allow the infringing apps/games to remain available in the application stores." *Id.* at
*6. The Court also held that the plaintiff had not alleged that "Google had notice from plaintiff of
its trademark infringement claims . . . or even that either knew of plaintiff's mark and knew that
the third parties' use of the mark was unauthorized." *Id.* Here, of course, Plaintiff has alleged both
Google's specific knowledge of its trademark and direct infringement by other developers, which
make the facts alleged here easily distinguishable from those alleged in *Free Kick Master*.

B. The Complaint States a Claim For Tortious Interference With Prospective Economic Advantage, and This Claim is Not Subject To Dismissal Based Upon An Affirmative Defense Arising Under The CDA

Google next contends, with respect to Plaintiff's claim for tortious interference with prospective economic advantage, that it is entitled to immunity under § 230(c)(2)(A) of the CDA and/or that Plaintiff has failed to allege facts sufficient to state a claim. Both of these contentions lack merit. First, CDA immunity is not an issue properly decided on a Rule 12(b)(6) motion, but even if it were, this affirmative defense is not available to Google where the Complaint adequately alleges that Google's conduct in removing Plaintiff's App from Google Play was not taken in good faith. Second, contrary to Google's contention, Plaintiff has adequately pled all elements of this cause of action.

1. *CDA Immunity Is Both Unripe For Determination on a Rule 12(b)(6) Motion and Unavailable To Google*

Section 230(c)(2)(A) of the CDA, codified at 47 U.S.C. 230(c)(2)(A), provides that no civil liability may be imposed against an interactive computer service for

any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2)(A) (emphasis added); *see also Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) ("To assert an affirmative defense under § 230(c)(2)(A), a moving party must qualify as an "interactive computer service," that voluntarily blocked or filtered material it considers "to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," and did so in "good faith").

As a threshold matter, this Court must decide whether CDA immunity, an affirmative defense, can even be raised on a Rule 12(b)(6) motion. *Perfect 10, Inc. v. Google, Inc.*, 2008 WL 4217837 at *8 (C.D. Cal. 2008) ("preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion."); *accord Swift v. Zynga Game Network, Inc.*, No. C 09-

05443 SBA, 2010 WL 4569889 at *6 (N.D. Cal. Nov. 3, 2010); but *see Holomaxx*, 783 F. Supp. 2d at 1103 (“an affirmative defense properly may be considered on a Rule 12(b)(6) motion where the defense is ‘apparent from the face of the [c]omplaint’”). If the Court decides it this defense may not be considered on a pre-answer motion to dismiss, it need go no further in denying this prong of the motion.

Even if the Court were to consider whether Google is entitled to CDA immunity on this motion, Google’s motion should still be denied. Even assuming that Google can show that Google Play is an interactive computer service and that Plaintiff’s App falls within the scope of “otherwise objectionable” content that may be removed, as Google readily acknowledges (Mov. Br. at 12-13), to obtain CDA immunity, Google must also establish that it has acted in “good faith” in removing Plaintiff’s App from Google Play.¹⁰ Accepting the allegations in the Complaint as true, Google cannot meet its burden as a matter of law. Plaintiff has alleged that Plaintiff’s App fully complied with all Google’s policies and procedures and that there was no justification to remove Plaintiff’s App from Google Play or suspend its developer account. (Complaint ¶¶ 63, 95.) Plaintiff further alleges that it received a letter from a Google employee confirming Plaintiff’s own belief that Google had “no real justification” for the adverse actions taken against Plaintiff in 2013 and 2014, and that such actions were taken in the personal interest of Google employees to punish Plaintiff for submitting complaints to enforce its legitimate trademark rights. (*Id.* at ¶ 104.) The Complaint further alleges that Google has no actual policy against using the word “spy” in the name of an app,

¹⁰ If the Court finds that allegations in the Complaint are insufficient to demonstrate that Google lacked the requisite good faith required for CDA immunity, Plaintiff requests leave to amend the Complaint (*see* Point II.C, *infra*) to allege that Google is not merely an interactive computer service, but is actually an information content provider not entitled to CDA immunity because Google provides code that all apps must incorporate in order to access Android® phones and be listed on Google Play. *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 987 (N.D. Cal. 2015) (rejecting Apple’s assertion of CDA immunity on a Rule 12(b)(6) motion based on allegations that Apple “contributed to the creation of the offensive content” by providing app developers with instructions and code required to access a user’s address book data without prior permission).

1 and that Plaintiff was the only developer that Google had ever prevented from using the word “spy”
 2 in the name of its app (*Id.* at ¶ 105), an allegation that Plaintiff supports with a partial list of apps
 3 that contained the word “spy” in the name that were allowed to remain listed on Google Play after
 4 Plaintiff’s App had been removed. (*Id.* at ¶ 83.) Plaintiff also alleges that Google’s employees
 5 orchestrated the removal of Plaintiff’s App from Google Play not because the content or
 6 functionality was “objectionable,” but because they had a financial incentive to do so. (*Id.* at ¶
 7 106.) These allegations are more than sufficient to survive a motion to dismiss. *Moving and*
 8 *Storage, Inc. v. Panayotov*, No. 12–12262–GAO, 2014 WL 949830 at *2 (D. Mass. Mar. 12, 2014)
 9 (if bad faith is adequately pled, availability of CDA immunity defense “cannot be appropriately
 10 decided” on a Rule 12(b)(6) motion absent “a developed factual record”).

12 The upon which Google most heavily relies in arguing that Plaintiff has failed to
 13 sufficiently allege that Google has not acted in good faith is readily distinguishable. In
 14 *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill 2008) (cited in Mov. Br. at 13),
 15 the plaintiff, who the court described as a “spammer,” sued Comcast for failing to allow it to
 16 deliver bulk email messages through Comcast’s servers. The plaintiff alleged that Comcast had
 17 unfairly “singl[ed] out” plaintiff, and that others behaving in a like manner were treated differently.
 18 *Id.* at 609. Here, by contrast, while it is true that Plaintiff claims that has been treated differently
 19 than other developers who use are allowed to use the word “spy” in the name of their app
 20 (Complaint ¶¶ 81-84), Plaintiff’s Complaint goes much further. Plaintiff alleges not only disparate
 21 treatment, but that Google’s employees orchestrated the removal of Plaintiff’s App from Google
 22 Play for their own personal financial gain. (*Id.* at ¶ 106.) *See also Smith v. Trusted Universal*
 23 *Standards in Electronic Transactions, Inc.*, Civ. No. 09–4567, 2010 WL 1799456 at * 7 (D.N.J.
 24 May 4, 2010) (allegation that defendant blocked email for financial motive, namely to encourage
 25 plaintiff to upgrade his service plan, satisfies the requirement of pleading bad faith). In addition,
 26 while the district court in *e360Insight* found that “a mistaken choice to block [the plaintiff’s

1 emails], if made in good faith, cannot be the basis for liability” in light of the immunity afforded by
 2 § 230, *e360Insight*, 546 F. Supp. 2d at 609, Plaintiff here does not just allege that Google made a
 3 mistake. Rather, Plaintiff asserts that Google knew, directly or through its employees, that “there
 4 was no real justification” for removing Plaintiff’s App from Google Play and/or suspending
 5 Plaintiff’s developer account, but did these anyway. (Complaint at ¶ 104.) This is the very
 6 definition of bad faith behavior.

7
 8 2. *Tortious Interference With Prospective Economic Advantage Has Been Adequately Pled*

9 Alternatively, Google contends that Plaintiff’s Complaint fails to state a claim for tortious
 10 interference with prospective economic advantage. (Mov. Br. 13-15.) This is not correct.

11 The elements of a cause of action for interference with prospective economic advantage are:
 12 “(1) an economic relationship between the plaintiff and some third party, with the probability of
 13 future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3)
 14 intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual
 15 disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the
 16 acts of the defendant.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003)
 17 (quoting *Westside Center Associates v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521–522
 18 (1996)). In addition, a plaintiff must plead that the defendant’s conduct was “wrongful by some
 19 legal measure other than the fact of interference itself.” *Id.* (citing *Della Penna v. Toyota Motor*
 20 *Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995)). An act is “independently wrongful if it is
 21 unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or
 22 other determinable legal standard.” *Id.* at 1159.¹¹
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 25

26 ¹¹ Google also cites New Jersey law in arguing that Plaintiff has failed to state a claim for tortious
 27 interference. (Mov. Br. at 14.) However, given that the DDA provides that California law governs
 28 “any legal matter arising from this [DDA]” (Dkt # 35-5) and the New Jersey District Court, in
 ordering a transfer of this action to this court, expressly held that Plaintiff’s claim for “tortious
 (Continued...)

Google contends that Plaintiff has not adequately pled an independently wrongful act by Google because the DDA vests Google with the “sole discretion” to remove an app that Google has found to have violated its developers policies, and that, in removing Plaintiff’s App from Google Play, Google did nothing more than “exercise its contractual rights under the DDA – ‘superior’ rights that cannot be the basis for the finding of malicious or tortious conduct.” (Mov. Br. at 14.) This does not fairly characterize the allegations in the Complaint. Plaintiff’s Complaint alleges acts that, if proven, would establish that Google engaged in conduct that violates California Business & Professions Code § 17200 (California’s “Unfair Competition Law” or “UCL”), which prohibits, *inter alia*, any “unfair ... business act or practice.” The Unfair Competition Law “was intentionally framed in its broad, sweeping language” to provide recourse for persons injured by unlawful or unfair business practices that might not be covered by traditional torts. *Holomaxx*, 783 F. Supp. 2d at 1107 (N.D. Cal. 2011) (citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 181 (1999)). “To support liability under the ‘unfair’ prong, the conduct must either ‘offend[] an established public policy or [be] immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers’ or be ‘tethered to specific constitutional, statutory or regulatory provisions.’” *Id.* at 1108 (citing *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1274 (2006)).

Here, Plaintiff alleges that, even though Plaintiff’s App complied in all respects with Google Play’s policies and procedures, Google terminated and suspended Plaintiff’s developer account in 2013 and 2014 with “no real justification” for doing so because Plaintiff submitted

(...Continued)

interference originates from the DDA,” (Dkt. # 21 at p. 6), it is law of the case that California law governs. Even without that prior determination, California law would apply. *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, 1051 (N.D. Cal. 2013) (“Under California law, ‘[a] valid choice-of-law clause, which provides that a specified body of law ‘governs’ the ‘agreement’ between the parties encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized, including tortious breaches of duties emanating from the agreement or the legal relationship it creates’”).

legitimate complaints about apps posted by other developers. (Complaint ¶¶ 63, 95, 104-106.)¹²

Although the “sole discretion” language in the DDA may allow Google to remove an app that violates one of Google’s developer policies, this language does not immunize Google from liability if, as Plaintiff has alleged, Plaintiff’s App did not violate any of Google’s policies, but was taken down by Google employees who were advancing their own secret deals with other developers. (*Id.* at ¶¶ 104- 106.) *See Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 372 (1992) (party that retains a discretionary power to act under a contract still must exercise that discretion in good faith and in accordance with the parties’ expectations); *see also Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 969 (1986) (employer can be held liable for employee’s actions under doctrine of respondeat superior, regardless of whether employee’s act benefits the employer). Plainly, not enforcing its own rules and providing preferential treatment to other developers constitutes “unfair” conduct by Google within the broad scope of § 17200, and not simply an exercise of rights under the DDA. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008) (“[A] breach of contract may form the predicate for a section 17200 claim, provided it also constitutes conduct that is unlawful, or unfair, or fraudulent,” citing *Nat’l Rural Telecommunications Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074 (C.D. Cal. 2003)); *see generally Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994) (“‘Unfair’ simply means any practice whose harm to the victim outweighs its benefits”); *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432, 452 (1988) (holding that “manifestly unfair” conduct by defendant violates the UCL, even absent proof that practice was deceptive or fraudulent). The Ninth Circuit has held that alleging a violation of California’s Unfair Competition

¹² The Complaint’s citation to specific instances in which Google violated its own rules (Complaint ¶¶ 63, 95, 104-106) overcomes Google’s inaccurate contention that Plaintiff has merely alleged bad faith conduct is a “conclusory” or “formulaic” fashion. (Mov. Br. at 14.) If necessary to correct a pleading deficiency, Plaintiff can amend its Complaint to add examples of other violations, including Google’s refusal of Plaintiff’s request to remove reviews of Plaintiff’s App that violate Google’s profanity rules. (*See* Point II.C, *infra*.)

1 Law is sufficient to meet the requirement of pleading an independent wrong giving rise to a claim
 2 for interference with prospective economic advantage. *CRST Van Expedited, Inc. v. Werner*
 3 *Enterprises, Inc.*, 479 F.3d 1099, 1110 (9th Cir. 2007). Having adequately alleged an act or
 4 practice that may constitute unfair competition under the UCL, the question of whether Google
 5 actually violated the UCL cannot be resolved on a Rule 12(b)(6) motion. *Watson Labs., Inc. v.*
 6 *Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1117 (C.D. Cal. 2001) (“Whether a business act
 7 or practice constitutes unfair competition within Section 17200 is a question of fact”).

8
 9 As a second line of attack, Google contends that Plaintiff’s claim for tortious interference is
 10 barred by the contractual limitation on liability contained in § 12 of the DDA, which provides that
 11 Google may not be held liable “. . . under any theory of liability for any direct, indirect, incidental,
 12 special consequential or exemplary damages that may be incurred” (Mov. Br. at 15.) This
 13 argument should be rejected because the limitations of damages clause in the DDA is
 14 unconscionable as applied between Google and Plaintiff. *Rodman v. Safeway Inc.*, No. 11-CV-
 15 03003-JST, 2015 WL 5117616 at *4 (N.D. Cal. Aug. 31, 2015) (“limitation of liability clauses are
 16 enforceable unless they are unconscionable, that is, the improper result of unequal bargaining
 17 power or contrary to public policy,” quoting *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209
 18 Cal. App. 4th 1118, 1126 (2012)); *Clark v. LG Electronics U.S.A., Inc.*, No. 13-CV-485 JM JMA,
 19 2013 WL 5816410 at *15 (S.D. Cal. Oct. 29, 2013) (contractual provision precluding recovery of
 20 consequential damages not enforceable against weaker party where parties do not have equal
 21 bargaining power negotiation and the weaker party has no meaningful choice); *see generally*, Cal.
 22 Com. Code § 2719 (West) (“Consequential damages may be limited or excluded unless the
 23 limitation or exclusion is unconscionable”); Cal. Civ. Code § 1668 (West) (“All contracts which
 24 have for their object, directly or indirectly, to exempt anyone from responsibility for his . . .
 25 violation of law, whether willful or negligent, are against the policy of the law”). Enforcement of
 26 the limitation of damages clause here would be particularly anomalous since it would effectively

1 insulate Google, the dominant player in the market for Android® apps (Complaint ¶ 15), not just
2 from claims for consequential damages, but from liability under any circumstances, regardless of
3 the nature of the conduct alleged. Moreover, the DDA limitation should be interpreted to protect
4 Google only from good faith acts taken in its own interest, not the self-interested acts of its
5 employees.

6
7 C. If Any Element of Plaintiff's Claims Has Not Been Properly Pled, Plaintiff Requests
8 Leave To Amend

9 If the Court finds that any element of Plaintiff's claims has not been adequately pled,
10 Plaintiff respectfully requests leave to amend its Complaint. "Leave to amend must be granted
11 unless it is clear that the complaint's deficiencies cannot be cured by amendment." *Holomaxx*, 783
12 F. Supp. 2d at 1102 (citing *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995));
13 *see also id.* at 1105 (dismissing plaintiff's claims based on CDA § 230, but granting leave to re-
14 plead for plaintiff to allege additional facts supporting its assertion that defendant's actions were
15 not taken in good faith); *Free Kick Master*, 2015 WL 6123058, at *6 (granting plaintiff leave to re-
16 plead claim for contributory trademark infringement since "this is the first time a court has ruled on
17 the adequacy of plaintiff's claims").
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1 III. CONCLUSION

2 For the foregoing reasons, Google's motion should be denied in all respects and the action
3 should proceed to discovery.

4
5 GREENBERG FREEMAN LLP
6 RIMON P.C.

7 Dated: November 5, 2015

8 By: /s/ Neil A. Smith
9 Neil A. Smith
10 Attorneys for the Plaintiff
11 SPY PHONE LABS LLC.
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CERTIFICATE OF SERVICE

I, Neil A. Smith, hereby certify that on November 5, 2015 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

By: /s/ Neil A. Smith
Neil A. Smith